87-1728

Supreme Court, U.S.
FILED
APR 20 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

GERMANTOWN SAVINGS BANK
and I.C.S. CORPORATION,

~~Petitioners~~ Appellants,

v.

CITY OF PHILADELPHIA,

~~Respondent~~ Appellees.

~~PETITION FOR~~ APPEAL FROM THE PENNSYLVANIA SUPREME COURT

Stephen A. Cozen
A Member of the Bar of this Court
Vincent R. McGuinness, Jr.
Barbara J. Kaufmann
COZEN AND O'CONNOR
Attorneys for ~~Petitioners~~ Appellants
1900 Market Street
The Atrium — Third Floor
Philadelphia, Pennsylvania 19103
(215) 665-2000

PACKARD PRESS / LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

QUESTION PRESENTED FOR REVIEW

If 42 Pa.C.S.A. §8553(d) of Pennsylvania's Political Subdivision Tort Claims Act is construed as a bar to subrogation claims, does it not violate the equal protection guarantees of the fourteenth amendment to the United States Constitution?

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Table of Contents	ii
Table of Citations	iii
Opinions Below	1
Statement of Jurisdiction	2
Statement of Corporate Affiliation	2
Constitutional and Statutory Provisions Involved	2
Statement of the Case	3
Jurisdiction of the Courts Below	5
Reasons for Granting the Appeal	6
The Pennsylvania Political Subdivision Tort Claims Act, as construed, bars an insurer's subrogation claim, discriminates against insurers with no rational basis, and thereby violates the equal protection guarantees of the fourteenth amendment	6
A. Denial of Access to the Courts — A Fundamental Right	7
B. The Statute, as Construed, Bars the Rights of a Single Class and Fails Even Under the Rational Basis Test	9
Conclusion	14

TABLE OF CITATIONS

Cases:	Page
Ayala v. Philadelphia Board of Education, 453 Pa. 584, 305 A.2d 877 (1973)	3
Bernthal v. City of St. Paul, 376 N.W.2d 422 (Minn. 1985)	12
Blue Cross and Blue Shield of Florida, Inc. v. Matthews, 498 So.2d 421 (Fla. 1986)	4, 6
Bounds v. Smith, 430 U.S. 817 (1977)	7
City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985)	8
Fisher v. Hill, 368 Pa. 53, 81 A.2d 860 (1951)	4
Germantown Savings Bank and I.C.S. Corp. v. City of Philadelphia, 98 Pa.Commw. 508, 512 A.2d 756 (1986), *aff'd*, ___ *Pa.* ___ , 535 A.2d 1052 (1988)	1
Grayson v. Williams, 256 F.2d 61 (10th Cir. 1958)	11
Greyhound Food Management, Inc. v. City of Dayton, 653 F.Supp. 1207 (S.D.Ohio 1986)	11, 12, 13
James v. Strange, 407 U.S. 128 (1972)	13
Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)	7
McCoy v. Goldin, 598 F.Supp. 310 (S.D.N.Y. 1984)	7
McLaughlin v. Florida, 379 U.S. 184 (1964)	8
Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974)	9
Metropolitan Life Insurance Co. v. Ward, 470 U.S. 869, *reh'g denied*, 471 U.S. 1120 (1985)	7, 9
Michel v. City of Bethlehem, 84 Pa.Commw. 43, 478 A.2d 164 (1984)	5
Phan v. Commonwealth of Virginia, 806 F.2d 516 (4th Cir. 1986)	10
Plyler v. Doe, 457 U.S. 202 (1982)	7, 9, 10, 11

TABLE OF CITATIONS—(*Continued*)

Cases: Page

Robson v. Penn Hill School District, 63 Pa. Commw. 250, 437 A.2d 1273 (1983) 12

Schweiker v. Wilson, 450 U.S. 221 (1981) 9

Shapiro v. Thompson, 394 U.S. 618 (1969) 9, 12

Silver v. Cormier, 529 F.2d 161 (10th Cir. 1976) 7

Topelski v. Universal South Side Autos, Inc., 407 Pa. 339, 180 A.2d 414 (1962) 11

United States Department of Agriculture v. Moreno, 413 U.S. 528 (1973) 10

Statutes:

28 U.S.C. §1257(2) 2

Ark. Stat. Ann. §13-1416(b) 6

Conn. Stat. Ann. §4-160(b) 6

Fla. Stat. §627.7372(1) 6

Ga. Code Ann. §28-5-85(e) 6

Minn. Stat. §466.03 12

N.J. Stat. Ann. §59:9-2(e) 6

Ohio Rev. Code §2744.05(B) 6, 11

Okla. Stat. Ann. tit. 51, §160 6

40 Pa. Cons. Stat. Ann. §636(2) 6, 11

40 Pa. Cons. Stat. Ann. §1009.111 6

42 Pa. Cons. Stat. Ann. §702(b) 4, 5

42 Pa. Cons. Stat. Ann. §762(a)(4) 5, 6

42 Pa. Cons. Stat. Ann. §931 6

42 Pa. Cons. Stat. Ann. §8541 3

42 Pa. Cons. Stat. Ann. §8542 ..... 3, 7

TABLE OF CITATIONS—(*Continued*)

Statutes:	Page
42 Pa. Cons. Stat. Ann. §8553(d)	*passim*
42 Pa. Cons. Stat. Ann. §8564	12
77 Pa. Cons. Stat. Ann. §671	6
Rules:	
Supreme Court Rule 10.1	14
Pa. Rule of Appellate Procedure 701	4
Pa. Rule of Civil Procedure 2002	4
United States Constitution:	
Amendment XIV	2, 5
Pennsylvania Constitution:	
Article 3, Section 32	5
Other Authorities:	
Commonwealth of Pennsylvania Local Government Commission, *A Working Paper — Municipal Tort Law in Pennsylvania; Analysis and Recommendations* (1977)	8
Report of the Joint State Commission on Sovereign Immunity, May 1978	8
Testimony on S. No. 1477 Before the House Committee on Local Government (August 21, 1977)	8

APPENDIX

Appendix A — Judgment and Order of the Supreme Court of Pennsylvania, *Germantown Savings Bank and I.C.S. Corporation v. City of Philadelphia*, Nos. 39 and 160 E.D. Appeal Docket 1987, January 22, 1988	A-1
Appendix B — Opinion of the Commonwealth Court of Pennsylvania, *Germantown Savings Bank and I.C.S. Corporation v. City of Philadelphia*, 98 Pa.Commw. 508, 512 A.2d 756 (1986)	A-3

TABLE OF CITATIONS—*(Continued)*

Page

Appendix C — Opinion of the Commonwealth Court of Pennsylvania, *Michel v. City of Bethlehem*, 84 Pa.Commw. 43, 478 A.2d 164 (1984) A-12

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

GERMANTOWN SAVINGS BANK
and I.C.S. CORPORATION,

Petitioners,

v.

CITY OF PHILADELPHIA,

Respondent.

PETITION FOR APPEAL FROM THE PENNSYLVANIA SUPREME COURT

OPINIONS BELOW

The Supreme Court of Pennsylvania, in a per curiam order and without opinion, reported as *Germantown Savings Bank and I.C.S. Corporation v. City of Philadelphia*, ____Pa. ____, 535 A.2d 1052 (1988), upheld the decision and opinion of the Commonwealth Court of Pennsylvania, reported as *Germantown Savings Bank and I.C.S. Corporation v. City of Philadelphia*, 98 Pa. Commw. 508, 512 A.2d 736 (1986). Both decisions are included in the appendix.

STATEMENT OF JURISDICTION

The Pennsylvania Supreme Court affirmed per curiam, and without opinion, the Pennsylvania Commonwealth Court's decision on January 22, 1988.

This Court's jurisdiction is based upon 28 U.S.C. §1257(2), as this is a petition for appeal intended to bring before the Court a judgment in a civil action rendered by the Pennsylvania Supreme Court that upholds a state statute on federal constitutional grounds.

STATEMENT OF CORPORATE AFFILIATION

Germantown Savings Bank and I.C.S. Corporation are Pennsylvania corporations. Their subrogated insurance carrier is Federal Insurance Company, which is wholly owned by the Chubb Corporation and operated by Chubb & Son, Inc.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment XIV to the Constitution of the United States which provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Pennsylvania Political Subdivision Tort Claims Act codified at 42 Pa.C.S.A. §8553(d) which provides:

> Insurance benefits — If a claimant receives or is entitled to receive benefits under a policy of insurance other than a life insurance policy as a result of losses for which damages are recoverable under subsection (c), the amount of such

benefits shall be deducted from the amount of damages which would otherwise be recoverable by such claimant.

STATEMENT OF THE CASE

Germantown Savings Bank ("GSB") and I.C.S. Corporation ("ICS") instituted separate actions against the City of Philadelphia ("City") alleging that the City's negligence in maintaining and repairing fire hydrants and water mains caused damage by flood at the GSB and ICS premises. GSB and ICS were each reimbursed by their insurer for the damage.[1] Their insurer, Federal Insurance Company, submitted these claims to the City seeking recovery pursuant to the Political Subdivision Tort Claims Act (hereinafter "Act") which governs claims against municipalities.[2] The insurer then commenced subrogation actions in the Court of Common Pleas of Philadelphia County. Although the insurer was the real party in interest, the suits

---

1. The GSB action involved a June 16, 1982, rupture in a water main located on Front and Chestnut Streets in Philadelphia, Pennsylvania. The ICS action involved a September 18, 1980, rupture of a fire hydrant located at the southwest corner of 23rd and Chestnut Streets, Philadelphia, Pennsylvania.

2. In 1973, the Supreme Court of Pennsylvania abolished the common-law doctrine of governmental immunity. *Ayala v. Philadelphia Board of Education*, 453 Pa. 584, 305 A.2d 877 (1973). Fearing unlimited liability for its subdivisions and an inability to obtain insurance coverage, the Pennsylvania legislature enacted in 1978 (and later amended in 1980) the Political Subdivision Tort Claims Act. 42 Pa.C.S.A. §8541 *et seq*. The Act reinstated governmental immunity except for negligent acts encompassed in eight enumerated categories. 42 Pa.C.S.A. §8542 (1980). The eight exceptions include:

1. Vehicle liability.
2. Care, custody, or control of personal property.
3. Care, custody, or control of real property.
4. Dangerous conditions of trees, traffic controls and street lighting.
5. Dangerous conditions of utility service facilities.
6. Dangerous conditions of streets.
7. Dangerous conditions of sidewalks.
8. Care, custody, or control of animals.

The liability sought to be imposed in these cases is encompassed in exception (5), the dangerous condition of utility service facilities — a water main and fire hydrant.

were commenced in the names of the insureds as permitted by Pennsylvania Rule of Civil Procedure 2002.

After answering the complaints, the City filed motions for partial summary judgment claiming that section 8553(d) of the Act barred the insurer's subrogation claims.[3] The trial court granted the motion for partial summary judgment[4] and certified for immediate appeal two issues: (1) does section 8553(d) of the Act bar subrogation, and (2) if so, is the provision constitutional.[5]

---

3. Section 8553(d) of the Political Subdivision Tort Claims Act expressly provides for the setoff of insurance proceeds which a claimant is entitled to receive against the amount of damages which would otherwise be recoverable from the political subdivision. The provision states:

> Insurance benefits — If a claimant receives or is entitled to receive benefits under a policy of insurance other than a life insurance policy as a result of losses for which damages are recoverable under subdivision (c), the amount of such benefits shall be deducted from the amount of damages which would otherwise be recoverable by such claimant.

Neither by its express terms nor by its intent does this clause of the Act bar a subrogation action against a political subdivision. The purpose of section 8553(d) is to bar double recovery. Double recovery to the victim of a municipality's tortious act is impossible under the subrogation contract the victim has with its insurer. *Blue Cross and Blue Shield of Florida, Inc. v. Matthews*, 498 So.2d 421 (Fla. 1986), for any recovery from the municipality or political subdivision would enure to the benefit of the victim's uncompensated insurer.

4. Pennsylvania law prohibits the splitting of a cause of action. *Fisher v. Hill*, 368 Pa. 53, 81 A.2d 860 (1951). Therefore, the insurer paid each of its insureds for the property damage suffered in excess of the policies' deductibles and then instituted suit against the City in the name of its insured. Each suit sought to recover for both the insured loss, for which the insurer was uncompensated, and any uninsured losses. The trial court's grant of partial summary judgment dismissed the insurer's subrogation claim; the court left intact the insureds' claims for uninsured losses.

5. GSB and ICS filed separate petitions for permission to appeal the interlocutory orders issued by the trial court as required under Pa. R. App. P. 701. Under this procedure, the trial court certifies that the issues are controlling questions of law where there is a substantial ground for difference of opinion and that the appeal will materially advance the ultimate termination of the litigation. The appellate court has the discretion to grant or deny the interlocutory appeal. 42 Pa.C.S.A. §702.

The Commonwealth Court of Pennsylvania[6] limited the appeals to a determination of section 8553(d)'s constitutionality, finding that the issue of construction and application of this section of the Act had been previously determined in *Michel v. City of Bethlehem*, 84 Pa. Commw. 43, 478 A.2d 164 (1984).[7] On July 7, 1986, after argument before the court en banc, the commonwealth court determined that section 8553(d) was constitutional when construed as a bar against subrogation. ICS and GSB then petitioned for allowance of appeal to the Supreme Court of the Commonwealth of Pennsylvania challenging both the lower court's construction of the Act and the constitutionality of the Act as applied.[8] The petition for allowance of appeal was granted. On January 22, 1988, the Supreme Court of the Commonwealth of Pennsylvania affirmed per curiam, and without opinion, the decision of the commonwealth court upholding the constitutionality of the construed subrogation bar.

JURISDICTION OF THE COURTS BELOW

Jurisdiction was vested in the Pennsylvania Supreme Court pursuant to 42 Pa.C.S.A. §702(b). Jurisdiction of the Pennsylvania Commonwealth Court was based upon 42 Pa.C.S.A.

---

6. The commonwealth court is the intermediate appellate court which handles all appeals of cases involving political subdivisions. 42 Pa.C.S.A. §762(a)(4). The commonwealth court consolidated the two separate actions on February 21, 1985.

7. *Michel* involved a suit instituted by homeowners and their subrogated insurer against the City of Bethlehem for damages sustained as a result of the city's negligent maintenance of a water main. In *Michel*, the court held that the insurance setoff provision of section 8553(d) barred the insurer's subrogation action against the city. The constitutionality of this provision was not considered in *Michel*.

8. GSB and ICS asserted that section 8553(d) of the Act violated article 3, section 32 of the Pennsylvania Constitution and the equal protection clause of the fourteenth amendment to the United States Constitution. Article 3, section 32 of the Pennsylvania Constitution states in pertinent part that "[t]he General Assembly shall pass no local or special law in any case which has been or can be provided for by general law. . . ." The equal protection clause provides: "no state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

§762(a) (4). Jurisdiction in the trial court, the Court of Common Pleas of Philadelphia County, was based upon 42 Pa.C.S.A. §931.

REASONS FOR GRANTING THE APPEAL

The Pennsylvania Policital Subdivision Tort Claims Act, as construed, bars an insurer's subrogation claim, discriminates against insurers with no rational basis, and thereby violates the equal protection guarantees of the fourteenth amendment.

The Pennsylvania Supreme Court erred when it affirmed the commonwealth court's decision that section 8553(d) of the Pennsylvania Political Subdivision Tort Claims Act does not deny insurers the equal protection guarantees of the fourteenth amendment. The section, as construed,[9] targets a specific class, insurers, and bars only their claims.

---

9. The phrase "as construed" recognizes that this petition must be decided in light of *Michel* which held that the language of the section was a bar to subrogation. In the courts below, petitioners urged the courts to overrule *Michel* because on its face the section does not bar subrogation. The language of section 8553(d) merely requires that insurance proceeds received by a claimant be deducted from any claim against the municipal subdivision in order to prevent double recovery. However, a subrogating insurer has not been compensated by any collateral sources.

If the Pennsylvania legislature intended to bar subrogation against a political subdivision, it would have expressly provided for such within the statute itself. *See, e.g.*, Pennsylvania No-Fault Act, 40 Pa.C.S.A. §1009.111 (1974) (repealed 1984). In fact, the legislature has acknowledged public policy favoring subrogation. *See, e.g.*, 77 Pa.C.S.A. §671 (subrogation of employer in workmen's compensation) and 40 Pa.C.S.A. §636(2) (subrogation requirement for standard fire insurance policies).

Moreover, setoff provisions in sister states' political subdivision tort claims acts that bar subrogation actions have expressly stated that intention clearly within their statutes. *See, e.g.*, Ark.Stat.Ann. §13-1416(b); Conn.Stat.Ann. §4-160(b); Ga. Code Ann. §28-5-85(e); N.J.Stat.Ann. §59:9-2(e); Ohio R.C. §2744.05(B); Okla.Stat.Ann.tit. 51, §160.

Additionally, an analogous provision of a Florida automobile collateral source statute was construed by that state's highest court *not* to preclude health insurers from seeking subrogation from automobile tortfeasors. Fla. Stat. §627.7372(1) (1986 Supp.); *Blue Cross and Blue Shield of Florida, Inc. v. Matthews*, 498 So.2d 421, 422 (Fla. 1986).

The fourteenth amendment requires that any classification which singles out an indentified group for distinctive treatment must be rationally related to the purposes and objectives of the legislation. *Plyler v. Doe*, 457 U.S. 202, 216 (1982). Barring the claims of only a single class, insurers, bears no rational relationship to the purposes and objectives of the section — preventing double recovery, compensating the uncompensated, and protecting the public fisc.

Every citizen[10] is guaranteed equal treatment under the law of the states by the fourteenth amendment. Where, as here, the City has consented to suit,[11] the courts are required to provide equal treatment to all similarly situated classes of persons suing the City, including insurers. Like other citizens, insurers are entitled to the same rights and privileges as those enjoyed by other citizens. *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869 (1985).

A. Denial of Access to the Courts — A Fundamental Right

The decision of the Pennsylvania Supreme Court denies subrogated insurers the benefit of a remedy to enforce the statutory right to compensation for the tortious acts of the City. This is impermissible. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). The supreme court's interpretation of the section, which bars subrogation claims, unduly burdens an insurer's *fundamental* right of access to the courts. *McCoy v. Goldin*, 598 F.Supp. 310 (S.D.N.Y. 1984), *citing Bounds v. Smith*, 430 U.S. 817 (1977); *Silver v. Cormier*, 529 F.2d 161 (10th Cir. 1976) (relocation officer's threat to withhold monies due plaintiffs if plaintiffs filed suit in an independent matter held to unduly burden the fundamental right of access to the courts).

In *Bounds*, prisoners, possessing the right to petition the court for *habeas corpus* relief, were denied access to the courts because of a woefully inadequate prison library. Moreover, no

---

10. A corporation is a citizen under the fourteenth amendment and its equal protection guarantees. *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869 (1985).

11. 42 Pa.C.S.A. §8542.

other comparable legal assistance was available. This Court held that the inadequate library coupled with no alternative "effectively foreclosed" the prisoners' fundamental right of access to the courts. 430 U.S. at 830.

> It should be noted that while adequate law libraries are one constitutionally acceptable method to assure meaningful access to the courts, our decision here . . . does not foreclose alternative means to achieve that goal.

Id.

Similarly, the Commonwealth of Pennsylvania gives claimants a *right* to compensation for tortious acts of the City; yet, the courts have erected an insurmountable barrier to the *remedy* by construing the statute as a bar against subrogation. With no alternative available, this bar "effectively forecloses" the insurers' fundamental right of access to the courts.

Where a fundamental right is implicated the "strict scrutiny" test is applied. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985). Under the strict scrutiny test, the burden is on the state to demonstrate that the classification is necessary to promote a *compelling* state interest. *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964).

Although the legislative history is scant, the purpose of the Pennsylvania Political Subdivision Tort Claims Act is the protection of the public fisc by clearly defining the risks for which the political subdivision is liable.[12] Commonwealth of Pennsylvania Local Government Commission, *A Working Paper — Municipal Tort Law in Pennsylvania; Analysis and Recommendations* at Preface, 17 (1977); Testimony on S. No. 1477 Before the House Committee on Local Government (August 21, 1977); *Report of the Joint State Commission on Sovereign Immunity* (May 1978).

---

12. Prior to the adoption of the Act, there were no limitations on liability because the Pennsylvania Supreme Court abrogated governmental immunity in *Ayala*. *See* note 2, *supra*.

Protecting the public purse, standing alone, is not a *compelling* state interest where a fundamental right is implicated. *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 263 (1974) (invalidated a durational residency requirement for the receipt of medical benefits because it severely penalized the exercise of the fundamental right to travel). Thus, the insurers' fundamental right of access to the courts cannot be unduly burdened where the state's only justification for the legislation is protecting its pocketbook.

B. The Statute, as Construed, Bars the Rights of a Single Class and Fails Even Under the Rational Basis Test

Even under the less stringent rational basis test, the bar to subrogation is a violation of equal protection. The statute, as written, provides equal treatment to all citizens, individuals, insurers, and other corporations. Yet, the statute, as construed, bars the rights of only a single class — insurers. Such a distinction can be sanctioned only if there is a rational relationship between the legitimate purpose of the legislation and the distinction created. *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869, 882-83 (1985).

The purported legislative purposes for section 8553(d) are to prevent double recovery to the victim of the political subdivision's tortious act, compensate the uncompensated, and yet protect the City's fiscal integrity. While the protection of the public fisc is a legitimate state goal,[13] this need, in and of itself, does not provide sufficient justification for upholding a discriminatory classification. *Plyler v. Doe*, 457 U.S. 202, 227 (1982) (invalidated an ordinance barring undocumented school age children from free public education, because the costs were a drain on the state's treasury).

In *Plyler*, this Court stated:

> [A] concern for the preservation of resources standing alone can hardly justify the classification used in allocating those

---

13. *Schweiker v. Wilson*, 450 U.S. 221, 238-39 (1981); *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969).

> resources. *Graham v. Richardson*, 403 U.S. 365, 374-75 (1971). The state must do more than justify its classification with a concise expression of an intention to discriminate. *Examining Board v. Flores de Otero*, 426 U.S. 572, 605 (1976).

457 U.S. at 227. Thus, "the simple articulation of a justification for a challenged classification does not conclude the judicial inquiry." *Phan v. Commonwealth of Virginia*, 806 F.2d 516, 521 (4th Cir. 1986). The discriminatory classification must "further some substantial state interest." *Plyler v. Doe*, 457 U.S. at 230.

Section 8553(d), as construed, establishes two classifications. One classification includes claimants with insurance. Those claimants are required by the statute to deduct insurance proceeds received from any compensation for which the City might be liable. This provision is equally applied among all *compensated* claimants who are similarly situated. Conversely, the second class is comprised of those with no insurance who are entitled to compensation from the City. The statute serves a legitimate, public purpose — protection of the public fisc and compensation for the uncompensated. Yet, within the class of uncompensated claimants, the supreme court has carved out a single class for unequal treatment — insurers. They alone are barred from recovery.

> [I]f the constitutional conception of "equal protection of the laws" means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.

United States Dept. of Agriculture v. Moreno, 413 U.S. 528, 534 (1973) (emphasis in original).

Barring insurers' claims serves no legitimate, public purpose. It has no rational relationship to the implied purposes of compensation for the uncompensated and protection of the public fisc. Would it be fair to exclude non-residents from compensation; corporations with assets in excess of $5 million; citizens with red hair? Certainly not. Yet the result of the section, as construed, is to exempt from the statute's protection

only insurers who cannot be compensated pursuant to their statutory,[14] contractual,[15] and equitable rights.[16] A fundamental concept of our legal system mandates that legal burdens should be borne by the individual responsible for the wrongdoing. *Plyler v. Doe*, 457 U.S. at 220. A bar to subrogation inequitably shifts the risk for the wrongdoing from the political subdivision tortfeasor and the public to the innocent insured, its insurer, and all others insured by that insurer.[17] "No reason in law, equity or good conscience can be advanced why a wrongdoer should benefit from part payment from a collateral source of damages caused by his wrongful act." *Grayson v. Williams*, 256 F.2d 61, 65 (10th Cir. 1958).

The exemption of insurers in section 8553(d), as construed, establishes a classification that is both irrational and discriminatory. At least one court has so held. *Greyhound Food Management, Inc. v. City of Dayton*, 653 F.Supp 1207, 1214 (S.D.Ohio 1986). *Greyhound* is the only case nationwide, apart from the present action, to confront the constitutionality of the bar to a subrogation provision in a political subdivision tort claims act.[18] The United States District Court for the Southern District of

---

14. 40 Pa.C.S.A. §636(2).

15. Federal Insurance Company's insurance policies for both GSB and ICS provided: "If any person to or for whom we make payment under this insurance has rights to recover damages from another, those rights are transferred to us to the extent of our payment."

16. In *Topelski v. Universal South Side Autos, Inc.*, 407 Pa. 339, 180 A.2d 414, 421 (1962) (citation omitted), the Pennsylvania Supreme Court stated:

> "The doctrine of subrogation is based 'on considerations of equity and good conscience * * * to promote justice * * * [and] is granted as a means of placing the ultimate burden of the debt upon the person who should bear it.' * * * 'It is a device adopted by equity to compel the ultimate discharge of an obligation by him who in good conscience ought to pay it.' "

17. This Court may take judicial notice of the fact that by allocating risks and properly assessing fault, adverse loss experience is explained and compensated, premiums are determined on a fair basis, and the insuring public does not suffer. This is the purpose of subrogation.

18. Ohio R.C. §2744.05(B) by its terms expressly bars subrogation suits against a political subdivision.

Ohio held that while barring suits of subrogated claimholders conserved municipal resources, the classification itelf did nothing to promote fiscal soundness. *Greyhound*, 653 F.Supp. at 1214.

The courts of Pennsylvania, like the legislature of Ohio, are attempting to accomplish the goal of fiscal integrity by creating invidious distinctions between classes of citizens similarly situated. *Shapiro v. Thompson*, 394 U.S. at 633. Where, as here, the stated purpose of the Pennsylvania Act is to stabilize the political subdivision's liability by clearly defining the risks in order to obtain insurance coverage to compensate victims of the tortious acts of the political subdivision,[19] that purpose is not advanced by this irrational discrimination between classes of citizens. Barring a suit by an uncompensated insurer does nothing to enhance the City's ability to obtain liability coverage and control the risk, and yet compensate the uncompensated victims of its tortious acts.

Closely analogous is a Minnesota statute preserving municipal immunity from tort causes of action instituted by persons covered by the Workers' Compensation Act. Minn.Stat. §466.03. The state's highest court held that protecting the public fisc and ensuring compensation to injured parties were legitimate state purposes, but that these purposes were not advanced by a classification discriminating between municipal tort victims who received workers' compensation benefits and those victims who were privately insured. *Bernthal v. City of St. Paul*, 376 N.W.2d 422, 426 (Minn. 1985).

Similarly, the discriminatory classifications created by section 8553(d), as construed, bear no rational relationship to the purposes for which the Political Subdivision Tort Claims Act was enacted — compensating the uncompensated and protecting the public fisc. "[A party] must do more than show that denying benefits. . . saves money." *Shapiro* 394 U.S. at 633.

---

19. In *Robson v. Penn Hill School District*, 63 Pa. Commw. 250, 255, 437 A.2d 1273, 1276 (1983), the court sated that the purpose for the Act is to confine the government's liability to eight designated categories in order to enhance the City's ability to obtain insurance. Section 8564 of the Act expressly authorizes the political subdivision to obtain insurance.

Section 8553(d), as construed, does not merely differentiate between insurers and other uncompensated claimholders. It prohibits the uncompensated insurer from seeking a remedy created by the government that has given its consent to be sued. This requirement of equal treatment is particularly applicable where the state creates an immunity for its subdivisions which previously did not exist. *Greyhound*, 653 F.Supp. at 1215. The subrogation bar embodies elements of punishment and violates the rights of citizens to equal treatment under the law. *James v. Strange*, 407 U.S. 128, 142 (1972) (this Court invalidated an analogous setoff procedure in Kansas in which indigent defendants were denied all exemptions available to other judgment debtors until repayment of state funds advanced for legal services).

In the final analysis, we are confronted with a discriminatory class, insurers, that has been denied the right to a remedy and access to the courts by the judicial construction of a statute, that on its face, provides no such discrimination. There is no rational relationship for this distinction. The distinction must fail as repugnant to basic constitutional guarantees.

CONCLUSION

The Pennsylvania Supreme Court's decision violates the petitioners' fundamental right of access to the courts, and equal protection of the laws. As such, it calls for an exercise of this Court's supervisory powers under Supreme Court Rule 10.1. The petitioners respectfully request this Court to grant this petition and reverse the judgment of the Pennsylvania Supreme Court.

Respectfully submitted,

STEPHEN A. COZEN
A Member of the Bar of this Court
VINCENT R. McGUINNESS, JR.
BARBARA J. KAUFMANN
Attorneys for Petitioners

APPENDIX

SUPREME COURT of PENNSYLVANIA
EASTERN DISTRICT

Germantown Savings Bank, Appellant at No. 39	:	
and	:	
I.C.S. Corporation Appellant at No. 160	:	Nos. 39 and 160 E.D. Appeal Docket 1987
v.	:	
City of Philadelphia	:	

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the ORDER of the COMMONWEALTH COURT, be, and the same is hereby AFFIRMED.

BY THE COURT

Marlene F. Lachman, Esq.
Prothonotary

Dated: January 25, 1988

[J-26 of 1988]

IN THE

SUPREME COURT OF PENNSYLVANIA

EASTERN DISTRICT

GERMANTOWN SAVINGS BANK, Appellant at No. 39	:	Nos. 39 and 160 E. D. Appeal Dkt. 1987
and	:	Appeals from Order of Commonwealth Court entered July 7, 1986, at Nos. 9 and 15 T.D. 1985, Affirming Orders of Court of Common Pleas of Philadelphia, Trial Division, Civil Section, entered October 10, 1984, at No. 897 September Term 1982 and October 12, 1984, at No. 5803 May Term, 1983
I.C.S. CORPORATION Appellant at No. 160	:	
v.	:	
CITY OF PHILADELPHIA	:	
	:	___ Pa.Commw. ___, ___ A.2d ___ (1986)
	:	Argued: January 22, 1988

ORDER

PER CURIAM: FILED: JANUARY 22, 1988

Order affirmed.

Germantown Savings Bank, *Appellant*	:	In the Commonwealth Court of Pennsylvania
v.	:	
City of Philadelphia, *Appellee*	:	No. 15 T.D. 1985

I. C. S. Corporation, *Appellant*	:	In the Commonwealth Court of Pennsylvania
v.	:	
City of Philadelphia, *Appellee*	:	No. 9 T.D. 1985

BEFORE:
HONORABLE JAMES CRUMLISH, JR., President Judge
HONORABLE THEODORE O. ROGERS, Judge
HONORABLE DAVID W. CRAIG, Judge
HONORABLE JOHN A. MacPHAIL, Judge
HONORABLE JOSEPH T. DOYLE, Judge
HONORABLE FRANCIS A. BARRY, Judge
HONORABLE JOSEPH GARDNER COLINS, Judge

ARGUED: April 9, 1986

OPINION BY JUDGE MacPHAIL FILED: July 7, 1986

The sole issue presented for our disposition in these consolidated appeals is whether Section 8553(d) of the Political Subdivision Tort Claims Act (Act), 42 Pa. C.S. §8553 (d) is unconstitutional as violative of equal protection. For the reasons which follow, we hold that Section 8553(d) of the Act is constitutional.

The facts are not in dispute. I.C.S. Corporation and Germantown Savings Bank (Appellants) brought separate subrogation actions against the City of Philadelphia (City) alleging that the City's negligence in inspecting and maintaining certain fire hydrants caused the hydrants to rupture and destroy Appellants' property.[1] The trial court determined that the City was not

---

1. I.C.S. Corporation (ICS), through its insurance company, brought a subrogation action against the City in the Court of Common Pleas of Philadelphia County alleging, *inter alia*, that the City negligently inspected and maintained a fire hydrant which ruptured on September 18, 1980 and flooded ICS's premises. ICS sought judgment against the City for an amount not in excess of twenty thousand dollars ($20,000.00), together with interest, delay damages and costs of suit. ICS received $10,212.29 from its insurance company for the damage done to its property. Similarly, Germantown Savings Bank (GSB) brought suit against the City claiming $44,662.30 in damages as a result of a water main break on June 16, 1982. GSB received $44,162.30 from its insurance company to compensate for the damage done to its property.

The City filed separate preliminary objections to both complaints averring that the complaints did not conform to the Act. Appellants, in turn, alleged that Section 8553(d) of the Act did not apply to the matter at hand or, in the alternative, that that section was unconstitutional. Pursuant to Pa. R.C.P. No. 235, Appellants notified the Attorney General of their challenge to the constutionality of Section 8553(d).

The trial court denied the City's preliminary objections. The City thereafter filed an Answer and New Matter asserting that the Act precluded the subrogation actions. Appellants each filed a Motion to Dismiss the New Matter and the City filed cross-motions for partial summary judgment. The trial court denied both motions to dismiss and granted the cross-motions. Upon application, the trial court certified as a controlling question the constitutionality of Section 8553(d) and appeals were taken by Appellants to this Court. On February 21, 1985, we accepted both appeals and specifically limited the issue to whether Section 8553(d) of the Act is unconstitutional as violative of equal protection. *See Michel v. City of Bethlehem*, 84 Pa. Commonwealth Ct. 43, 478 A.2d 164 (1984). Although Appellants invite us to

liable for any damages to the extent Appellants were compensated for their injuries by insurance. The court further held that the insurance companies had no right to subrogation, quoting *Aetna Casualty and Surety Co. v. Borough of Hamburg*, 22 Pa. D & C 3d 454, 458 (1982): "the political subdivision's liability for damages is statutorily limited and therefore it is not obligated to pay plaintiff's insured. Certainly, plaintiff's right under subrogation rises no higher than the right of its insured." Trial court opinion at 2-3.[2]

Section 8553 of the Act provides, in pertinent part:

§8553. Limitations on damages

(a) General rule. — Actions for which damages are limited by reference to this subchapter shall be limited as set forth in this section.

. . . .

(c) Types of losses recognized. — Damages shall be recoverable only for:

. . . .

(6) Property losses.

(d) Insurance benefits. — If a claimant receives or is entitled to receive benefits under a policy of insurance other than a life insurance policy as a result of losses for which damages are recoverable under subsection (c), the amount of such benefits shall be deducted from the amount of damages which would otherwise be recoverable by such claimant.

It is Appellants' position that Section 8553(d) of the Act violates the equal protection clauses of the Pennsylvania and United

---

reconsider our decision in *Michel*, we decline to do so. It is our opinion that our decision in *Michel* correctly disposed of the issues presented therein. Note that there was not a constitutional challenge to the Act in *Michel*.

2. In disposing of the motions and cross-motions, the trial court attached the opinion of *Aetna Insurance Co. v. City of Philadelphia* (No. 2417 November Term 1982, filed June 22, 1984) as the opinion of the court in both cases.

States Constitutions by unlawfully discriminating between classes of litigants and tortfeasors. Appellants argue that it is unlawful, and thereby unconstitutional, for plaintiffs-against-the government whose losses are privately insured to be treated in one way, while those plaintiffs-against-the government who do not have insurance are treated in another.[3]

Preliminary, we note that "one bears a heavy burden when he seeks to establish that a statute is constitutionally defective. Legislation will survive such an attack absent a showing that it '*clearly, palpably,* and *plainly* violates the Constitution,' . . . and any uncertainty must be resolved in favor of its validity." *Lyles v. City of Philadelphia*, 88 Pa. Commonwealth Ct. 509, 512, 490 A.2d 936, 939 (1985) (quoting *Daly v. Hemphill*, 411 Pa. 263, 271, 191 A.2d 835, 850 (1963) (emphasis in original)). Our Supreme Court has held that it is not *per se* violative of the equal protection clause for the Commonwealth to treat different classes in different ways. *Singer v. Sheppard*, 464 Pa. 387, 402, 346 A.2d 897, 904-905 (1975) (footnotes omitted):

> Our inquiry, however, cannot conclude with the discovery of unequal treatment . . . . Except where an invidious discrimination against a suspected class is at issue or a fundamental right burdened, "a legislative classification must be sustained unless it is 'patently arbitrary' and bears

---

3. Appellants assert that Section 8553(d) of the Act violates Article 3, Section 32 of the Pennsylvania Constitution and the Equal Protection Clause of the Fourteenth Amendment to the United States Consitution. Article 3, Section 32 of our state constitution states in pertinent part that "[t]he General Assembly shall pass no local or special law in any case which has been or can be provided for by general law . . . ." The Equal Protection Clause provides "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." Those provisions, however, must be read in conjunction with the provisions of Article 1, Section 11 of the Constitution of Pennsylvania, which state: "All courts shall be open; and every man for an injury done him . . . shall have remedy by due course of law . . . . *Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct.*" (Emphasis added).

no rational relationship to a legitimate governmental interest." Frontiero v. Richardson, 411 U.S. 677, 683, 93 S.Ct. 1764, 1768, 36 L.Ed 2d 583 (1973).

We must determine the appropriate standard of judicial review to be applied in reviewing this equal protection challenge. There are three different types of legislative classifications calling for three different analyses:

> The highest level, known as strict scrutiny, applies to legislative classifications infringing upon fundamental rights, such as free speech, and to those which are inherently suspect because they inordinately burden a group of citizens traditionally victimized by discrimination, for instance racial minorities . . . . Under this scrutiny, a classification will not pass constitutional muster unless it is necessary to advance a compelling state interest . . . . The next level, termed middle-level or intermediate scrutiny, applies to classifications affecting less fundamental rights, such as commercial speech, and to classifications which are not quite so suspect, such as gender . . . . When this test applies, a classification must serve an important government interest and be substantially related to the achievement of that interest . . . . The third level, employing the least scrutiny, is the rational relationship test. It applies to all other legislative classifications, for example those implicating economic rights. This minimal scrutiny upholds classifications unless they are patently arbitrary and lack any rational relationship to a legitimate government interest.

Lyles, 88 Pa. Commonwealth Ct. at 515-16, 490 A.2d at 940-41 (citations omitted).

Appellants argue that they have been denied the fundamental right of access to the courts and that strict scrutiny applies, or, at the very least, intermediate scrutiny. We disagree. Strict scrutiny applies only if the right infringed upon derives from the Constitution. *Plyler v. Doe*, 457 U.S. 202 (1982). Our state Supreme Court has held that there is no

fundamental right to sue the Commonwealth or its political subdivisions under either the United States or Pennsylvania Constitutions. *James v. Southeastern Pennsylvania Transportation Authority*, 505 Pa. 137, 477 A.2d 1302 (1984); *Carroll v. County of York*, 496 Pa. 363, 437 A.2d 394 (1981). Since the restriction imposed by Section 8553(d) of the Act does not create a suspect classification nor infringe upon a fundamental right, strict scrutiny is inappropriate.

Whether intermediate scrutiny is appropriate depends upon whether an important interest has been affected by the classification, and whether sensitive, though not suspect, classifications have been made. *James*. In *James*, the plaintiff-appellee claimed that the notice provisions of the Metropolitan Transportation Authorities Act[4] violated his equal protection rights because if he did not comply with the notice provisions, he would be unable to bring his suit against the Commonwealth. The Court made the following observations:

> Although it may be argued that James' liberty is not affected by this classification, since he was at liberty to sue the Commonwealth had he complied with the notice requirement, it is, nevertheless true that James' important interest in access to the courts to sue the Commonwealth in cases where the Commonwealth has consented to suit, has been restricted. Superior Court, therefore, was correct in determining that an intermediate or heightened scrutiny standard of review is appropriate.

James, 505 Pa. at 146-47, 477 A.2d at 1306. Appellants insist that their "important interest" in access to the courts has been restricted by Section 8553(d) of the Act. Appellants herein, however, are not denied access to the courts by Section 8553(d) of the Act they are deprived only of the economic right to "full" compensation, i.e., subrogation.[5] The appropri-

---

4. The Metropolitan Transportation Authorities Act of 1963, P.L. 984, 66 P.S. §2036 was repealed by the Act of April 28, 1978, P.L. 202.

5. Appellants likewise contend that Section 8553(d) impinges upon their constitutional right to a jury trial. It seems obvious to us that Appellants' right to a jury trial is unimpaired by Section 8553(d). Nowhere is there any language

ate level of scrutiny under the equal protection clause to be applied to the matter herein, therefore, is the rational relationship test. *See Lyles*.

We now turn to the relationship between the purpose behind the Act and the classes created and objected to. The Act provides political subdivisions, in this case the City, with immunity from suits except for those injuries resulting from eight separately described causes, and limits the extent of the political subdivision's liability when one of the eight exceptions applies. As noted in a prior decision of this Court, the purpose of the Act was "to stabilize the political subdivision's ability to obtain insurance coverage by defining the risks to be covered." *Robson v. Penn Hills School District*, 63 Pa. Commonwealth Ct. 250, 255, 437 A.2d 1273, 1276 (1981). In assessing a similar equal protection challenge to the Sovereign Immunity Act,[6] we noted that:

> A balance must be struck between unlimited potential liability and the need for fiscal security. Full monetary responsibility for the tortious conduct of [the Commonwealth's] agencies and employees involves the risk of an intolerable tax burden. . . . The legislature legitimately may take steps to preserve sufficient public funds to guarantee that the government will be able to continue to provide those services which it believes benefits the citizenry.

Lyles, 88 Pa. Commonwealth Ct. at 317, 490 A.2d at 941, quoting *Picariello v. Commonwealth*, 54 Pa. Commonwealth Ct. 252, 257, 421 A.2d 477, 480 (1980). The limit on awards recoverable by claimants[7] against political subdivisions assures

---

in that section which would restrict that right. The jury may award such damages as the evidence warrants; that award, however, must be reduced by the amount of insurance proceeds paid to the Appellants.

6. Section 5111 of the Judicial Code, *formerly* 42 Pa. C.S. §5111, repealed by the Act of October 5, 1980, P.L. 693. A similar provision is now found in Section 8528 of the Judicial Code, 42 Pa. C.S. §8628.

7. The *Carroll* Court declined to address this issue. *See* 496 Pa. at 370 n.4, 437 A.2d at 397 n.4.

"that the Commonwealth will not be required to process and defend various litigation brought against it in areas where risk management is totally uncertain. . . ." *Carroll*, 496 Pa. at 369, 437 A.2d at 397, quoting the Report of the Joint State Government Commission on Sovereign Immunity, May 1978 at 10.[8]

In sum, Section 8553(d) of the Act requires a plaintiff who is compensated for injuries from insurance companies to deduct this amount of compensation from the amount of compensation he would otherwise be entitled to recover in his claim asserted against the political subdivision. We hold that classifying plaintiffs who receive insurance benefits differently from those plaintiffs who will not receive insurance benefits is rationally related to the legitimate government interest in clearly defining the extent to which a political subdivision is at financial risk.[9] We conclude that Section 8553(d) of the Act is not violative of equal protection.

John A. MacPhail, Judge

---

8. Appellants' reliance upon *Ayala v. Philadelphia Board of Public Education*, 453 Pa. 584, 305 A.2d 877 (1973), for the proposition that our Supreme Court rejected economic justification when faced with a constitutional challenge to legislation, must fail. The *Ayala* court abrogated a judicially created doctrine; what is at issue in the case *sub judice* is an act of the Legislature. As the *Carroll* Court observed, "[it] is not our function to displace a rationally based legislative judgment." 496 Pa. at 369, 437 A.2d at 397.

9. The cases from other jurisdictions cited in Appellants' brief which have held that a limitation on recovery against municipalities where immunity has been waived violates equal protection under the law, are not, of course, binding upon us.

Appellants also argue that giving constitutional validity to Section 8553(d) will turn Pennsylvania's well recognized "collateral source" rule "on its head". The collateral source rule is a judicially created principle stating that damages recoverable by a tort victim are not reduced by any insurance benefits payable under a policy obtained by that victim. *Moidel v. Peoples Natural Gas Co.*, 397 Pa. 212, 154 A.2d 399 (1959). There is nothing to prevent the Legislature from enacting legislation which abrogates a judicial principle as long as the legislation is constitutionally valid. We here hold that Section 8553(d) is constitutionally valid exercise of legislative authority.

Germantown Savings Bank, *Appellant*	:	In the Commonwealth Court of Pennsylvania
v.	:	
City of Philadelphia, *Appellee*	:	No. 15 T.D. 1985

I. C. S. Corporation *Appellant*	:	In the Commonwealth Court of Pennsylvania
v.	:	
City of Philadelphia, *Appellee*	:	No. 9 T.D. 1985

ORDER

The order of the Court of Common Pleas of Philadelphia County in the above-captioned matter is hereby affirmed and the case remanded to the Court of Common Pleas of Philadelphia County for further proceedings.

Jurisdiction relinquished.

Date : July 7, 1986

John A. MacPhail, Judge
Certified from the Record
July 7, 1986
Deputy Prothonotary—Chief Clerk

IN THE
COMMONWEALTH COURT OF PENNSYLVANIA

Hans Michel and Wilhelmina Michel and State Farm Insurance Co., *Appellants*

v. : No. 77 C.D. 1983

CITY OF BETHLEHEM, *Appellee*

BEFORE:
HONORABLE THEODORE O. ROGERS, Judge
HONORABLE DAVID W. CRAIG, Judge
HONORABLE ALEXANDER F. BARBIERI, Judge

Argued: June 6, 1984 — Philadelphia

OPINION BY JUDGE ROGERS FILED: July 18, 1984

Hans and Wilhelmina Michel and the State Farm Insurance Company have appealed from an order of the Court of Common Pleas of Northampton County granting the City of Bethlehem's motion for summary judgment against State Farm.

The facts are not in dispute. On February 15, 1979, a water pipe owned and maintained by the City of Bethlehem ruptured causing damages in the amount of $23,490 to a house owned by Hans and Wilhelmina Michel. State Farm, as insurers of the damaged premises, paid the Michels $20,440.00 in discharge of its obligation under the policy of insurance. The Michels and State Farm brought separate actions against the City of Bethlehem. The Michels sought recovery of damages in the amount of $23,490.00. State Farm's action was based on its asserted right of subrogation and sought recovery of the $20,440 which it had paid to the Michels. The cases were consolidated and the City moved for summary judgment against both plaintiffs. The trial court entered a partial summary judgment against the Michels effectively reducing their claim to $3,050.00, the amount of their losses not already paid by State Farm. This action is not a subject of this appeal.

The trial court entered a summary judgment against State Farm's total claim holding that its suit was barred by Section 8553(d) of the Judicial Code, 42 Pa.C.S. §8553. State Farm has appealed from the judgment.

In *Ayala v. City of Philadelphia*, 453 Pa. 584, 305 A.2d 877 (1973), the Pennsylvania Supreme Court abrogated the doctrine of governmental immunity in Pennsylvania. In response, the Pennsylvania Legislature, pursuant to Article I, Section 11 of the Pennsylvania Constitution, enacted the Political Subdivisions Tort Claims Act.[1] This legislation reestablished the immunity of political subdivisions from suit, excepting however, claims of persons for injuries resulting from eight separately described causes. In the same Act, the Legislature placed limitation on the extent of the liability of political subdivisions to

---

1. Act of November 26, 1978, P.L. 1399, 53 P.S. §§5311.101-5311.803, presently 42 Pa.C.S. §§8541-8564.

injured persons in cases falling within the eight exceptions. In this case we are concerned with the limitation made by Section 8553(d) of the Act which provides:

> (d) Insurance Benefits — If a claimant receives or is entitled to receive benefits under a policy of insurance other than a life insurance policy as a result of losses for which damages are recoverable under subsection (c) the amount of such benefits shall be deducted from the amount of damages which would otherwise be recoverable by such claimant.

The parties agree that the Michels' claim falls within one of the eight exceptions to governmental immunity under the Tort Claims Act. As mentioned, the trial court decided that State Farm's claim was barred by Section 8553(d). State Farm contended below, and still contends that Section 8553(d) of the Act was intended by the Legislature only to prohibit double recovery by insured claimants and that it should not be read as a bar to its recovery as a subrogee of the Michels' claim against the city.

The trial court held, for three reasons with which we agree, that this argument fails.

First, as noted, the Act provides political subdivisions with immunity from suits except for those injuries resulting from the eight described causes. It makes no exception for suits brought by insurance carriers as subrogees of persons injured under circumstances falling within the exceptions. Hence, State Farm's suit is barred by the terms of the Act.

Second, the equitable doctrine of subrogation places the subrogee in the precise position of the one to whose rights and disabilities he is subrogated. *Fell v. Johnson*, 154 Pa. Superior Ct. 470, 36 A.2d 227 (1944). The Michels, being insured, have no claim against the City of Bethlehem for the damages covered by their insurance policy; hence, there is no claim to which State Farm can be subrogated.

Finally, under the clear language of Section 8553(d) of the Act, the Michels cannot recover from the City of Bethlehem for the $20,440.00 damages covered by their insurance policy.

Thus, recovery by State Farm of the $20,440.00 under the doctrine of subrogation would, in effect, accomplish indirectly that which Section 8553(d) forbids the Michels to do directly. Subrogation cannot be allowed where it is contrary to public policy or where it would accomplish by indirection that which a statute forbids to be done by direction. *In re: McGrath's Estate*, 159 Pa. Superior Ct. 78, 46 A.2d 735 (1946).

We add that Judge Richard D. Grifo's opinion for the Court of Common Pleas of Northampton County in this case and Judge Arthur Ed Saylor's opinion in *Aetna Casualty and Surety Company v. Borough of Hamburg*, 22 Pa. D.&C. 3d 454 (Berks Co. 1982), are not only to the same effect as our holding, they are also, at the very least, as enlightening as the foregoing.

Order affirmed.

Theodore O. Rogers, J.

Supreme Court, U.S.
FILED
MAY 20 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1728

In the Supreme Court of the United States

OCTOBER TERM, 1987

GERMANTOWN SAVINGS BANK,
AND I.C.S. CORPORATION,

Appellants,

v.

CITY OF PHILADELPHIA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

MOTION TO DISMISS OR AFFIRM

SEYMOUR KURLAND
A Member of the Bar of this Court
DENISE D. COLLIERS
PATRICK K. O'NEILL
City of Philadelphia Law Department
1540 Municipal Services Building
Philadelphia, Pennsylvania 19102
(215) 686-5224
Counsel for Appellee the City of Philadelphia

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
MOTION TO DISMISS OR AFFIRM	1
STATEMENT OF FACTS	1
ARGUMENT	3
I. No Final Judgment Or Decree Is Present	3
II. Appellants Have Failed To Satisfy The Prerequisites of Rule 28.4(c)	5
III. As The Only Right Involved In This Appeal Is Economic, There Exists No Substantial Federal Question	6
A. SECTION 8553(d) OF THE TORT CLAIMS ACT EMBODIES A LEGISLATIVE BALANCING OF ECONOMIC INTERESTS, PRECLUDING ANY PERSON FROM RECOVERING FOR LOSSES COMPENSABLE UNDER A POLICY OF INSURANCE	6
1. Parties Who Have a Cause of Action Against the City of Philadelphia, Cannot Recover Losses for Which They Are Insured	8
2. As the Federal Insurance Company Has No Independent Cause of Action Against the City and As the Doctrine of Subrogation Gives It No Rights Higher Than Its Insureds, Said Insurance Company Has Not Been Denied Access to the Pennsylvania Courts	9
B. WHERE A CHALLENGE TO ECONOMIC LEGISLATION IS PRESENT, SAID REGULATION MUST BE SUSTAINED WHERE IT SATISFIES THE RATIONAL RELATIONSHIP TEST	13
CONCLUSION	17

TABLE OF AUTHORITIES

Cases Page

Aetna Life Insurance Company v. Haworth, 300 U.S. 227, *rehearing denied*, 300 U.S. 687 (1937) 4

Carroll v. County of York, 496 Pa. 363, 437 A.2d 394 (1981) 7

City of New Orleans v. Dukes, 427 U.S. 297 (1976) .. 14-15

Coal Operators Casualty Co. v. United States, 76 F. Supp 681 (E.D. Pa. 1947) 12

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) .. 5

Dandridge v. Williams, 397 U.S. 471 (1970), *rehearing denied*, 398 U.S. 914 (1970) 15

Day Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952) . 14

Dominski v. Garrett, 276 Pa. Super. 18, 419 A.2d 73 (1980) 12

Duke Power Company v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978) 6, 15

Estate of Cargill v. City of Rochester, 119 N.H. 661 406 A.2d 704 (1979), *appeal dismissed*, 445 U.S. 921 (1980) 17

Fell v. Johnston, 154 Pa. Super. 470, 36 A.2d 227 (1944) 12

First National Bank of Ashley v. Reily, 165 Pa. Super. 168, 67 A.2d 679 (1949) 12

Ferguson v. Skrupa, 372 U.S. 726 (1963) 15

Germantown Savings Bank v. City of Philadelphia, 98 Pa. Cmwlth. 508, 512 A.2d 756 (1986), *affirmed per curiam*, ____ Pa. ____ , 535 A.2d 1052 (1988) ... 9, 10, 15-16

Gospel Army v. Los Angeles, 331 U.S. 543 (1947) 4

Homeowner's Loan Corp. v. Crouse, 151 Pa. Super. 259, 30 A.2d 330 (1943) 12

Katzenbach v. Morgan, 384 U.S. 641, 2d 828 (1966) ... 14

TABLE OF AUTHORITIES—*(Continued)*

Cases Page

Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973), *rehearing denied*, 411 U.S. 910 (1973) 14

Mascaro v. Youth Study Center, 514 Pa. 351, 523 A.2d 1118 (1987) 7, 10

McGowan v. Maryland, 366 U.S. 420 (1961) 17

Michel v. City of Bethlehem, 84 Pa. Cmwlth. 43, 478 A.2d 164 (1984) 3, 11-12

Morey v. Dowd, 354 U.S. 457 (1957), *overruled*, 427 U.S. 297 (1976) 15

North Dakota Pharmacy Board v. Snyder's Drug Stores, Inc. 414 U.S. 156 (1973) 4

Radio Station WOW, Inc. v. Johnson, 366 U.S. 120 (1945) . 4

Sambs v. City of Brookfield, 97 Wis. 2d 356, 293 N.W.2d 504 (1980), *cert. denied*, 499 U.S. 1035 (1980) .. 16-17

Singer v. Sheppard, 464 Pa. 387, 346 A.2d (1975) 6

Smith v. City of Philadelphia, 512 Pa. 129, 516 A.2d 306 (1986), *appeal dismissed*, ____ U.S. ____, 107 S.Ct. 1265 (1987) 6, 16

Williamson v. Lee Optical Co., 348 U.S. 483 (1955), *rehearing denied*, 349 U.S. 925 (1955) 14

Constitutions, Statutes and Rules

U.S. Constitution, Amendment XIV, Section 1 ..... 6, 14

28 U.S. C. §1257(2) 1, 3-4, 5

28 U.S.C. §2403(b) 5, 6

U.S. Supreme Court Rule 28.4(c) 5

Pa. Judicial Code, 42 Pa. C.S. §702(b) 2

TABLE OF AUTHORITIES—*(Continued)*

Constitutions, Statutes and Rules	Page
Act of November 26, 1978, 53 P.S. §5311.402	16
Poltical Subdivision Tort Claims Act,	
42 Pa. C.S. §8541	2, 6-7
42 Pa. C.S. §8542(a)	10, 11
42 Pa. C.S. §8542(b)	10, 11
42 Pa. C.S. §8553	7-8
42 Pa. C.S. §8553(b)	16
42 Pa. C.S. §8553(c)	11
42 Pa. C.S. §8553(d)	2, 3, 6, 8-10, 13, 15, 16

Treatises

Rhodes, *Couch on Insurance*, 2d (Rev. 1983)	11, 12

No. 87-1728

In the Supreme Court of the United States

OCTOBER TERM, 1987

GERMANTOWN SAVINGS BANK,
AND I.C.S. CORPORATION,

Appellants,

v.

CITY OF PHILADELPHIA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

MOTION TO DISMISS OR AFFIRM

Appellee, the City of Philadelphia, moves this Court to dismiss the appeal herein, or, in the alternative, to affirm the judgment of the Supreme Court of Pennsylvania on the grounds that there exists no final judgment within the meaning of 28 U.S.C.§ 1257(2); that Appellants' statement of jurisdiction fails to comply with U.S. Supreme Court Rule 28.4(c); and that the question on which the decision of the appeal depends is so insubstantial as not to need further argument.

STATEMENT OF FACTS

Appellants, Germantown Savings Bank and I.C.S. Corporation, instituted separate actions against Appellee, the City

of Philadelphia, for damages under the provisions of the Pennsylvania Political Subdivision Tort Claims Act, 42 Pa. C.S. §§8541 *et seq* (hereinafter referred to as "Tort Claims Act"). On motions from partial summary judgment, Appellee was successful in obtaining a ruling that, in accordance with Section 8553(d) of the Tort Claims Act, Appellants were precluded from recovering for losses which were the subject of a policy of insurance.

No judgment has been rendered on the questions of liability or damages.

While not contesting the applicability of the provisions of Section 8553(d) of the Tort Claims Act to themselves, the Appellants have constitutionally challenged the applicability of Section 8553(d) to their insurer, the Federal Insurance Company.

Appellants moved the trial court to amend its two orders granting the City's motions for partial summary judgment to include certification under, 42 Pa.C.S. §702(b),[1] that the orders involved controlling questions of law to which there are substantial grounds for difference and that an immediate appeal may materially advance the ultimate termination of this matter. Said motions were granted on October 10, 1984 in the Germantown Savings Bank case and on October 12, 1984 in the I.C.S. Corporation case.

The Commonwealth Court limited the interlocutory appeals to the issue of whether 42 Pa. C.S. §8553(d) violated the equal protection guarantees of the state and federal constitutions:

---

1. Section 702(b) of the Pennsylvania Judicial Code provides that:

Interlocutory appeals by permission.—When a court or other government unit, in making an interlocutory order in a matter in which its final order would be within the jurisdiction of an appellate court, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter, it shall so state in such order. The appellate court may thereupon, in its discretion, permit an appeal to be taken from such interlocutory order.

ORDER

NOW, February 21, 1985, upon consideration the petitions of I.C.S. Corporation and Germantown Savings Bank for permission to appeal and the responses thereto, said petitions are granted and said appeals are allowed from the orders entered in the Court of Common Pleas of Philadelphia County on October 10, 1984, in September Term, 1982, No. 897 and October 12, 1984, in May Term, 1983, No. 5803 respectively. Said appeals shall be limited to whether 42 Pa.C.S. §8553(a) [sic] is unconstitutional as violative of equal protection. *See* Pa. R.A.P. 1321; *Michel v. City of Bethlehem*, ____ Pa. Commonwealth Ct. ____, 478 A.2d 164 (1984).

On July 7, 1986, the Commonwealth Court, sitting *en banc*, held that Section 8553(d)'s prohibition against recovery for insured losses did not, *inter alia*, violate the equal protection clause of the Constitution of the United States of America. The Commonwealth Court reached this decision by applying the rational relationship test to a statutory provision limiting a party's right to full economic compensation.

The Supreme Court of Pennsylvania, on January 22, 1988, after oral argument, in a per curiam decision affirmed the ruling below of the Commonwealth Court.

ARGUMENT

I. No Final Judgment Or Decree Is Present

As set forth in Appellants' jurisdictional statement, the appeal has been taken under the provisions of 28 U.S.C. §1257(2), which states that

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being

> repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor if its validity.

There is no question that Section 1257 embraces as a prerequisite to an appeal the concept of finality. The purpose of this finality requirement is to avoid piecemeal review of state litigation; to prevent the rendering of advisory opinions; and to promote the concept of federalism by limiting unwarranted intrusion in state affairs:

> The finality requirements of 28 U.S.C. §1257, which limits our review of state court judgments, serves several ends: (1) it avoids piecemeal review of state court decisions; (2) it avoids giving advisory opinions in cases where there may be no real "case" or "controversy" in the sense of Art. III; (3) it limits review of state court determinations of federal constitutional issues to have at a minimum federal intrusion in state affairs.

North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156, 159 (1973); *Accord, Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120 (1945). In order for a judgment or a decree to be considered final, it must effectively determine the litigation, leaving no nonministerial matter to be judicially decided. *Gospel Army v. Los Angeles*, 331 U.S. 543 (1947).

Clearly the aforementioned requirement is not present here. The decision below is admittedly an interlocutory appeal. There has been no judgment in the Pennsylvania courts on the issues of liability or damages. There has been no adjudication of any present right of Appellants, premised on any established facts. *See, e.g., Aetna Life Insurance Co. v. Haworth*, 360 U.S. 227 (1937), *rehearing denied*, 360 U.S. 687 (1937). For all practical purposes, the state court litigation is in its earliest stages and any compensation that may be granted Appellants is purely hypothetical.

Moreover, the constitutional question may indeed be rendered moot by subsequent proceedings in the state judicial system. For example, a decision in favor of Appellee may be

rendered on the question of liability, thus nullifying any constitutional questions. A judgment is not final for purposes of 28 U.S.C. §1257 if the federal issue may not survive future state court proceedings. *See, e.g., Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469 (1975).

II. Appellants Have Failed To Satisfy The Prerequisites of Rule 28.4(c)

Supreme Court Rule 28.4(c) requires that, in a proceeding in which the constitutionality of a state statute is drawn into question, Appellants must set forth in their initial pleading, motion or paper filed with the Court that 28 U.S.C. §2403(b) may be applicable and must serve said pleading, motion on paper upon the Attorney General of the applicable state.[2]

In the appeal *sub judice,* Appellants explicitly challenge

---

2. In its entirety, Rule 28.4(c) of the United States Supreme Court Rules reads as follows:

> (c) In any proceeding in this Court wherein the constitutionality of any statute of a State is drawn in question, and the State or any agency, officer, or employee thereof is not a party, the initial pleading, motion, or paper in this Court shall recite that 28 U.S.C. §2403(b) may be applicable and shall be served upon the Attorney General of the State. In proceedings from any court of the United States as defined by 28 U.S.C. §451, the initial pleading, motion, or paper shall state whether or not any such court, pursuant to 28 U.S.C. §2403(b), has certified to the State Attorney General the fact that the constitutionality of such statute of the State was drawn in question.

Similarly, 28, U.S.C. §2403(b) provides that:

> (b) In any action, suit, or proceeding in a court of the United States to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The State shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

the constitutionality of an act of the Pennsylvania General Assembly, which act concerns the conduct of local governmental units. However, no notice of the applicability of 28 U.S.C. §2403(b) or notice of service upon the Attorney General of the Commonwealth of Pennsylvania can be found in Appellants' filings in this Court.

III. As The Only Right Involved In This Appeal Is Economic, There Exists No Substantial Federal Question

Appellant challenges the provisions of Section 8553(d) of the Political Subdivision Tort Claims Act, 42 Pa. C.S. §8553(d), as violative of the equal protection guarantees of the Fourteenth Amendment to the United States Constitution. As Section 8553(d) of the Tort Claims Act, which is set forth at page 8 of this motion, merely prohibits recovery against political subdivision for losses covered by a policy of insurance, the only right involved is an economic right. This Court has long recognized that: there is a "traditional presumption of constitutionality generally accorded economic regulations and that ... [said regulations must] be upheld absent proof of arbitrariness or irrationality on the part of ... [the legislature]. *Duke Power Company v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 83 (1978).

A. SECTION 8553(d) OF THE TORT CLAIMS ACT EMBODIES A LEGISLATIVE BALANCING OF ECONOMIC INTERESTS, PRECLUDING ANY PERSON FROM RECOVERING FOR LOSSES COMPENSABLE UNDER A POLICY OF INSURANCE

In order to understand the full scope and meaning of Section 8553(d) of the Tort Claims Act, 42 Pa.C.S. §8553(d), the statutory provision must be considered in light of the evil intended to be remedied by the legislature. *See, Smith v. City of Philadelphia*, 512 Pa. 129, 516 A.2d 306 (1986), *appeal dismissed*, ____ U.S. ____, 107 S.Ct. 1265 (1987); and *Singer v. Sheppard*, 464 Pa. 387, 346 A.2d 897 (1975). The General

Assembly of the Commonwealth of Pennsylvania enacted the Tort Claims Act, 42 Pa. C.S. §8541 *et seq.*, as a direct result of the judicial abrogation of governmental immunity. *See Carroll v. County of York*, 496 Pa. 363, 437 A.2d 394 (1981). Section 8541 of the Tort Claims Act expressly provides for a broad grant of governmental immunity:

> Except as otherwise provided in this subchapter, no local agency shall be liable for *any* damages on account of any injury to a person or property caused by any act of the local agency or an employee thereof or any other person.

42 Pa.C.S. §8541. (emphasis added). The General Assembly then proceeded to carve out eight narrow exceptions to this general legislative grant of immunity. *See*, 42 Pa.C.S. §8542. These exceptions are to be narrowly construed:

> Since . . . [Section 8542(b) is an exception to the rule of immunity, we believe that its extent must be narrowly interpreted given the expressed legislative intent to insulate political subdivisions from tort liability.

Mascaro v. Youth Study Center, 514 Pa. 351, 523 A.2d 1118, 1123 (1987).

Even within the eight narrow exceptions to immunity, the Pennsylvania legislature has limited the amount and type of damages a person could otherwise recover:

> §8553. *Limitations on damages*
>
> (a) *General rule.*—Actions for which damages are limited by reference to this subchapter shall be limited as set forth in this section.
>
> (b) *Amounts recoverable.*—Damages arising from the same cause of action or transaction or occurrence or series of causes of action or transaction or occurrences shall not exceed $500,000 in the aggregate.
>
> (c) *Types of losses recognized.*—Damages shall be recoverable only for:
>
> 1. Past and future loss of earnings and earning capacity.

2. Pain and suffering in the following instances:

(i) death; or

(ii) only in cases of permanent loss of a bodily function, permanent disfigurement or permanent dismemberment where the medical and dental expenses referred to in paragraph (3) are in excess of $1,500.

3. Medical and dental expenses including the reasonable value of reasonable and necessary medical and dental services, prosthetic devices and necessary ambulance, hospital, professional nursing, and physical therapy expenses accured and anticipated in the diagnosis, care and recovery of the claimant.

4. Loss of consortium.

5. Loss of support.

6. Property losses.

(d) *Insurance benefits.*—If a claimant receives or is entitled to receive benefits under a policy of insurance other than a life insurance policy as a result of losses for which damages are recoverable under subsection (c), the amount of such benefits shall be deducted from the amount of damages which would otherwise be recoverable by such claimant.

42 Pa.C.S. §8553. Given the expressed legislative intent to insulate political subdivisions from liability for torts and given the legislative intent to specify the amount and type of damages for which a person may recover, Section 8553(d) must be construed to promote such legislative mandate. It *bars* any person or entity from recovery for insured losses. There is no exception to this bar.

1. Parties, Who Have a Cause of Action Against the City of Philadelphia, Cannot Recover Losses for Which They Are Insured

As set forth in subparagraph (d) of Section 8553 of the Tort Claims Act, 42 Pa. C.S. §8553(d), no person, who is injured by the negligent conduct of a political subdivision that

falls within one of the eight narrow exceptions to immunity and who receives or is entitled to receive benefits under a policy of insurance, can recover such amounts from a political subdivision. As noted by the Commonwealth Court, Appellant, I.C.S. Corporation, ("ICS") has received from its insurer $10,212.29 for damages; ICS has sought a judgment against, Appellee, the City of Philadelphia, in an amount in excess of $20,000. *Germantown Savings Bank v. City of Philadelphia*, 98 Pa. Cmwlth. 508, 506, n.1, 512 A.2d 756, 757 n.1 (1986), *affirmed per curiam*, ____ Pa. ____, 535 A.2d 1052, (1988). Similarly, Appellant, Germantown Savings Bank ("GSB"), while asserting a claim against Appellee for $44,662.30 in damages, has received $44,162.30 from its insurance company. Thus, clearly, by the expressed terms of Section 8553(d), if there is a judgment against Appellee on the question of liability and if damages are calculated as alleged by Appellants, ICS will be limited to recovering from the City, damages, otherwise recoverable, in excess of $10,212.29, while the amount of damages that GSB can recover against the City will be limited to $500.00. On the other hand, Federal Insurance Company, which has suffered no losses falling with the eight narrow exceptions to immunity, can recover nothing. In other words, Section 8553(d) provides that recovery on a claim against a local government is limited to the amount of uninsured loss, regardless of the identity of the claimant.

2. As the Federal Insurance Company Has No Independent Cause of Action Against the City and As the Doctrine of Subrogation Gives It No Rights Higher Than Its Insureds, Said Insurance Company Has Not Been Denied Access to the Pennsylvania Courts

Firstly, Federal Insurance Company has no cause of action against the City under the Tort Claims Act.[3] In order for

---

3. Curiously enough, Appellants herein have not alleged that Section

damages to be recoverable under the Tort Claims Act, a person must satisfy three statutory requirements. *Mascaro v. Youth Study Center, supra,* 523 A.2d at 1121. These requirements are set forth in Section 8542 of the Act:

> §8542. Exceptions to governmental immunity.
>
> (a) Liability imposed.—A local agency shall be liable for damages on account of an injury to a person or property within the limits set forth in this subchapter if both of the following conditions are satisfied and the injury occurs as a result of one of the acts set forth in subsection (b):
>
> (1) The damages would be recoverable under common law or a statute creating a cause of action if the injury were caused by a person not having available a defense under section 8541 (relating to governmental immunity generally) or section 8546 (relating to defense of official immunity); and
>
> (2) The injury was caused by the negligent acts of the local agency or an employee thereof acting within the scope of his office or duties with respect to one of the categories listed in subsection (b). As used in this paragraph, "negligent acts" shall not include acts or conduct which constitutes a crime, actual fraud, actual malice or willful misconduct.
>
> (b) Acts which may impose liability.—The following acts by a local agency or any of its employees may result in the imposition of liability on a local agency: . . . .

42 Pa.C.S. §8542. The eight exceptions set forth in subdivi-

8553(d) denies them access to Pennsylvania Courts. Rather Appellants alleged that their insurance company, who has no cause of action against the City, has been denied such access. (*See*, Appellants' Jurisdictional Statement at pages 7-9.)

Even if Appellants were correct in their theory, their insured has not been denied a fundamental right. The Pennsylvania "Supreme Court has held that there is no fundamental right to sue the Commonwealth or its political subdivisions under either The United States or Pennsylvania Constitutions." *Germantown Savings Bank v. Philadelphia, supra,* at 98 Pa. Cmwlth. 514, 512 A.2d 759 (citations omitted).

sion (b) include: (1) vehicle liability; (2) care, custody or control of personal property; (3) real property; (4) trees, traffic controls and street lighting; (5) utility service facilities; (6) streets; (7) sidewalks; and (8) care, custody or control of animals.

The first statutory prerequisite set forth in Section 8542(a)(1) is that the damages be recoverable under a cause of action created by either the common law or statute. In the appeal, *sub judice*, Federal Insurance Company, theory of subrogation. However, as admitted below by GSB, ICS and Federal Insurance Company have concluded, "subrogation is not a cause of action . . . ." Pa. Supreme Court Brief of Appellants at p. 10.

> The identity of a cause of action is not changed by the subrogation of the insurer thereto. Thus, subrogation results only in a change in the beneficial ownership of the cause and has no effect on the character or underlying basis of a cause of action.

Rhodes, Couch on Insurance, 2d §61.37 Rev. (1983).

Federal Insurance Company also failed to satisfy the second prerequisite imposed by Section 8542(a)(2); that is, said insurance company has not suffered any injury, the proximate cause of which was the City's negligence. The insurance company was obligated to compensate GSB and ICS because of its contractual relationship with them, and not because of any breach of duty the City owed Federal Insurance Company. Thus, threshold requirements for the imposition of liability upon political subdivision have not been met.

Moreover, Section 8553(c) of the Political Subdivision Tort Claims Act, specifically sets forth the only types of damages that are recoverable against a government tortfeasor. *See* pages 7-8 *supra*. Compensation for an insurance company's contractual obligation to pay an insured is not specified as a recoverable item of damage.

Secondly, the Commonwealth Court in *Michel v. the City of Bethlehem*, 84 Pa. Cmwlth. 43, 478 A.2d 164 (1984), held that Section 8553(d) bars a claim for subrogation because "the equitable doctrine of subrogation places the subrogee in the

precise position of the one to whose rights and *disabilities* he is subrogated." *Id.* at 478 A.2d 166 (emphasis added), citing *Fell v. Johnston*, 154 Pa. Super 470, 36 A.2d 227 (1944). The right of subrogation is purely derivative and equitable in nature; the insurer-subrogee merely succeeds to the rights of the insured-subrogor:

> *The right of subrogation is purely derivative as the insurer succeeds only to the rights of the insured,* and no new cause of action is created. In other words, the concept of subrogation merely gives the insurer the right to prosecute the cause of action which the insured possessed against anyone legally responsible for the latter's harm; and this is so even though the right of subrogation is expressly declared by statute. (citations omitted) (emphasis added).

Rhodes, Couch on Insurance, 2d §61.37 Rev. (1983). The doctrine of subrogation places the insurer in precisely the same position as the insured, "for one cannot acquire by subrogation what another, whose rights he claims, did not have." *Couch on Insurance*, 2d *supra* at §61.36; *accord*, *Coal Operators Casualty Co. v. United States*, 76 F.Supp. 681 (E.D. Pa. 1947). The equities of the subrogee are worked out through the legal rights of the subrogor. In this sense, subrogation may be broadly defined as the substitution of one party in the place of another with reference to a lawful claim or right. *Homeowner's Loan Corp. v. Crouse*, 151 Pa. Super 259, 30 A.2d 330 (1943). *First National Bank of Ashley v. Reily*, 165 Pa. Super 168, 67 A.2d 679 (1949); *Dominski v. Garrett*, 276 Pa. Super. 18, 419 A.2d 73 (1980). Thus, subrogation neither enlarges nor restricts the subroger's rights against an alleged tort-feasor. It simply places the insurer in the position of the insured for the equitable purpose of vindicating the legal rights of the insured.

Since GSB and ICS are precluded from recovering for insured losses, their insurer, Federal Insurance Company, is likewise precluded from recovering said losses from the City. Federal Insurance Company is subject, under the doctrine of

equitable subrogation, to all the limitations on recovery that the Political Subdivision Tort Claims Act places upon GSB and ICS.

The right invoked by the insurer, Federal Insurance Company, cannot be viewed in a vacuum; to the extent the right exists, it exists only in relationship to the other parties to this appeal. As against the City, Federal Insurance Company's claim can only be vindicated via the equitable doctrine of subrogation. However, as stated above, longstanding principles of equity will not allow such vindication.

In summary, Section 8553(d) does not extinguish or limit any cause of action cognizable under the Tort Claims Act; it merely limits recovery under any cause of action to uninsured losses. Furthermore, said statutory provision does not prevent a person injured by, conduct of local government, that falls within one of the eight exceptions to immunity, from full compensation. It merely shifts the burden of compensating said injuries. For those injured parties whose losses are not covered by an insurance policy, the local government will shoulder the responsibility for all losses recoverable under the Act. For those injured parties whose losses are covered by an insurance policy, the local government will shoulder responsibility for compensating all otherwise recoverable, non-insured losses; while the insurance company will bear the responsibility for compensating the party for the insured losses. No party that has a cause of action cognizable under the Pennsylvania Tort Claims Act, that is, Appellants GSB and ICS, is denied access to the courts under the provisions of 42 Pa. C.S. §8553(d).

B. WHERE A CHALLENGE TO ECONOMIC LEGISLATION IS PRESENT, SAID REGULATION MUST BE SUSTAINED WHERE IT SATISFIES THE RATIONAL RELATIONSHIP TEST

Appellants contend that if their insurer is not allowed to recover against the City the amount of the insured loss, then their insurer, Federal Insurance Company, will have been denied the equal protection of the laws, as guaranteed by the

federal and state constitutions. The Fourteenth Amendment to the United States Constitution provides, in part, that:

> No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend XIV, §1.

Where state statutes regulating economic rights are concerned this Court has—with only one exception—consistently utilized the rationality test in its review of constitutional challenges to properly enacted legislation.

> When local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as the desirability of particular statutory discriminations. *See, e.g., Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 93 S.Ct. 1001, 35 L.Ed.2d 351 (1973). Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, or decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest. States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude. Legislatures may implement their program step by step, *Katzenbach v. Morgan*, 384 U.S. 641 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966), in such economic areas, adopting regulation that only partially ameliorate a perceived evil to future regulations. *See e.g., Williamson v. Lee Optical Co.*, 348 U.S. 483, 488-489 75 S.Ct. 461, 464-465, 99 L.Ed. 563 (1955). In short, the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines, *see, e.g., Day Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 72 S.Ct. 405, 407, 96 L.Ed. 469 (1952); in

> the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment. *See, e.g., Ferguson v. Skurpa,* 372 U.S. 726, 732 83 S.Ct. 1028, 1032, 10 L.Ed.2d 93 (1963) (footnote omitted.)

City of New Orleans v. Dukes, 427 U.S. 297, 303-304 (1976); *Accord, Duke Power Company v. Carolina Environmental Study Group, Inc., supra,* and *Dandridge v. Williams,* 397 U.S. 471 (1970), *rehearing denied,* 398 U.S. 914 (1970). Indeed, the one exception to this principle during the last sixty years—*Morey v. Dowd,* 354 U.S. 477 (1957)—has since been overruled in *New Orleans v. Dukes, supra* at 427 U.S. 306.

The Pennsylvania appellate courts have held in the decision below that the right addressed by Section 8553(d) is the right to full economic compensation, which invokes the application of the rationality test:

> Appellants insist that their "important interest" in access to the courts has been restricted by Section 8553(d) of the Act. Appellants herein, however, are not denied access to the courts by Section 8553(d) of the Act—they are deprived only of the economic right to "full" compensation, i.e., subrogation. The appropriate level of scrutiny under the equal protection clause to be applied to the matter herein, therefore, is the rational relationship test.

Germantown Savings Bank v. City of Philadelphia, supra, at 98 Pa. Cmwlth. Ct. 514, 512 A.2d 756.

The Pennsylvania courts proceeded to rule that the statutory provision in question represented a balance between subjecting political subdivisions to unlimited liability and preserving the public fisc:

> In assessing a similar equal protection challenge to the Sovereign Immunity Act, we noted that:
>
> > A balance must be struck between unlimited potential liability and the need for fiscal security. Full monetary responsibility for the tortious conduct of [The Commonwealth's] agencies and employees involves the risk

> of an intolerable tax burden. . . . The legislature legitimately may take steps to preserve sufficient public funds to guarantee that the government will be able to continue to provide those services which it believes benefits the citizenry.

Id. at 98 Pa. Cmwlth. 516, 512 A.2d 760. And, as such, Section 8553(d) of the Tort Claims Act, was "rationally related to the legitimate government interest in clearly defining the extent to which a political subdivision is at risk . . . and not violative of equal protection." Id. at 98 Pa. Cmwlth 517, 512 A.2d 760-761. In utilizing the established federal standard to review a challenge to a wholly economic regulation, the Pennsylvania courts have done nothing that would present a substantial federal question.

Moreover, Appellee's position that no substantial federal question is further buttressed by this Court's action in other cases involving the constitutionality of provisions of various state tort claims statues. Indeed, in *Smith v. Philadelphia*, ____ U.S. ____ 107 S.Ct. 1265 (1987), this Court dismissed an appeal challenging the $500,000 ceiling on recovery against a political subdivision under Section 402 of the Act of November 26, 1978, 53 P.S. 5311.402, which was subsequently recodified as Section 8553(b) of the Tort Claims Act, 42 U.S.C. §3553(b).[4] Similarly an application for a writ of certiorari was denied in *Sambs v. City of Brookfield*, 97 U.S. 2d 356, 293 N.W. 2d 504 (1980), *cert denied*, 499 U.S. 1035 (1980). The Wisconsin Supreme Court had employed the rationality standard in rejecting a constitutional challenge to the $25,000.00 limit on recovery:

> It is the legislature's function to evaluate the risks, the extent of exposure to liability, the need to compensate citizens for injury, the availability of and cost of insurance, and the financial condition of the governmental units. It is the legislature's function to structure statutory

---

4. Section 8553(b) of the Tort Claims Act is set forth at page 7 of this Motion.

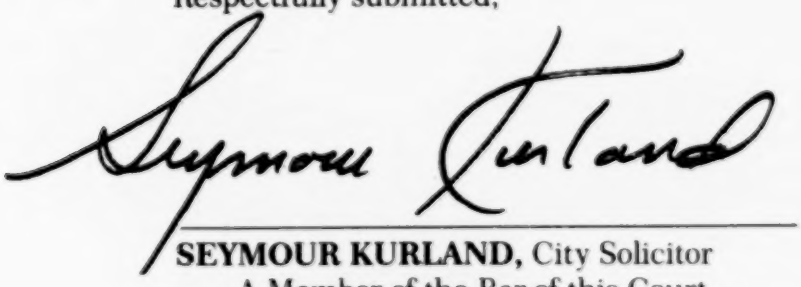
> provisions, which will be fair and reasonable to the victim and at the same time will be realistic regarding the financial burden to be placed on the taxpayers. Giving due deference to the legislature, this court will not set aside a statutory classification "if any state of facts reasonably may be conceived to justify it."

Id. at 514, quoting *McGowan v. Maryland*, 366 U.S. 420, 426 (1961). Likewise, an appeal was also dismissed in a case upholding the New York Tort Claim Act $50,000 limitation upon damages. *Estate of Cargill v. City of Rochester*, 119 N.H. 661, 406 A.2d 704 (1979), *appeal dismissed*, 445 U.S. 921 (1980).

CONCLUSION

For the reasons set forth above, Appellee, the City of Philadelphia, respectfully requests that this Court dismiss the appeal herein, or, in the alternative, affirm the decision of the Supreme Court of Pennsylvania.

Respectfully submitted,



SEYMOUR KURLAND, City Solicitor
A Member of the Bar of this Court
DENISE D. COLLIERS
PATRICK K. O'NEILL
City of Philadelphia Law Department
1540 Municipal Services Building
1500 J. F. Kennedy Boulevard
Philadelphia, Pennsylvania 19102-1692
(215) 686-5244
Counsel for Appellee the City of Philadelphia